IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,

Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI.

Petitioners, Pennsylvania Water & Power Company, a Pennsylvania corporation (Penn Water), and its wholly owned subsidiary, Susquehanna Transmission Company of Maryland, a Maryland corporation (Transmission Company), pray that a writ of certiorari be issued to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit (D. C. Circuit) entered in these cases on July 3 and 6, and September 6, 1951 (Printed Record (R.) Vol. 18, pp. 73, 74 and 78). The judgment and orders denied motions to set aside or remand, and instead affirmed, orders of the Federal Power Commission (FPC) directing continuance of, and premised on, substantive provisions of two power contracts which have been adjudged illegal. Such judgment and orders of the D. C. Circuit were entered on the decisions of a divided Court and were in direct conflict with the unanimous decision of the United States Court of Appeals for the Fourth Circuit (R., Vol. 18, p. 1) as to which this Court denied certiorari,* and the related decision of the United States District Court for Maryland (R., Vol. 18, p. 40),** declaring illegal the same two power contracts and holding that the FPC had no authority to validate them by the orders here involved.

Opinions Below.

The opinions and orders of the FPC of January 5, 1949, February 28, 1949 and October 27, 1949 are found at R., Vol. 16, pp. 39, 372 and Vol. 17, p. 46. The majority opinion of the D. C. Circuit (R., Vol. 18, p. 46) per Bazelon, Circuit Judge, in which Fahy, Circuit Judge, joined (the D. C. majority), and the dissenting opinion of Wilbur K. Miller,

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* *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light & Power Company of Baltimore, Public Service Commission of Maryland*, 184 F. 2d 552 (1950), cert. den. 340 U. S. 906 (1950).

** *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light & Power Co., Safe Harbor Water Power Corporation, Public Service Commission of Maryland*, 97 F. Supp. 952 (May 3, 1951) and Docket No. 5253 (Op. March 12, 1951 and Order March 19, 1951).

Circuit Judge, are not yet officially reported. The dissenting opinion, filed October 4, 1951, too late to be printed in the record, appears as Appendix B hereto. The order denying rehearing, to which Judge Miller also dissented, is found at R., Vol. 18, p. 78.*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U. S. C. §1254) and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. §825 l).**

State Statutes Involved.

The pertinent state corporate statutes are set forth in Appendix C and the pertinent state utility laws are set forth in the Appendix to the petition of the Pennsylvania Commission.***

Statement.

The primary issue raised by this petition is whether the FPC (in the absence of any express authority in the

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* While there was a voluminous record below, the basic issue here is a simple one as Judge Miller said (App. B., p. 2a), and all that is needed are the power contracts (R., Vol. 15, pp. 4554-4603, 4606-4621), opinions of the Fourth Circuit (R., Vol. 18, pp. 1, 35), and District Court for Maryland (R., Vol. 18, p. 40), judgments entered on such opinions (R., Vol. 18, pp. 75, 77), opinions of the D. C. Circuit (R., Vol. 18, p. 46, and Appendix B hereto,) and portions of the opinions and orders of the FPC (R., Vol. 16, pp. 39-59, 146-191, 372-388; Vol. 17, pp. 46-71); Petitioners were, however, unable to obtain from respondents' counsel a stipulation thus limiting the printed record.

** The judgment of the D. C. Circuit was entered on July 3, 1951 (R., Vol. 18, p. 73). Petitioners' motion for rehearing was denied September 6, 1951 (R., Vol. 18, p. 78). Application for a stay of certification to the FPC of the opinion and judgment (in lieu of mandate) of the D. C. Circuit pending application to this Court for a writ of certiorari was duly made, and the order granting the stay was entered (Transcript of Record (Tr.) p. 5750) and the stay extended to and including November 16, 1951.

*** The Pennsylvania Commission is also petitioning for certiorari to review the judgment and orders of the D. C. Circuit. Petitioners herein adopt the points in that petition.

Federal Power Act such as is found in certain other Federal regulatory statutes) may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to violate Federal antitrust laws, public policy and the laws of the utilities' state of incorporation.

The FPC orders, which the D. C. Circuit affirmed, were issued in proceedings to determine the rates to be charged for the services of Penn Water (and Transmission Company) to intervenor, Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) and three other electric utility customers located in Pennsylvania.* Penn Water's rates to Consolidated were contained in an illegal contract between Penn Water and Consolidated (the Baltimore contract)** which was linked to a companion contract (the Safe Harbor contract)**, also illegal, between Penn Water, Consolidated and Safe Harbor Water Power Corporation, a Pennsylvania electric generating utility (Safe Harbor). The FPC by these orders not only required a reduction in such rates but also required the continuance of substantive provisions of the illegal Baltimore contract, and based the critical features of the orders (such as the amount and allocation of the reduction, and the determination of jurisdiction over Penn Water's wholesale sales in Pennsylvania) upon the assumed existence and continuance of the illegal Baltimore and Safe Harbor contracts. The FPC termed these contracts the "system foundation contracts" (R., Vol. 16, pp. 45, 376).

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* Pennsylvania Power & Light Company (PP&L), Philadelphia Electric Company (PE) and Metropolitan Edison Company (ME).

** The Baltimore contract consisted of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 between Penn Water and Consolidated (R., Vol. 15, pp. 4577-4603, 4606-4621). The Safe Harbor contract consisted of three agreements dated June 1, 1931, August 1, 1932 and November 22, 1939 between Safe Harbor, Consolidated and Penn Water (R., Vol. 15, pp. 4554-4576). In the case of each contract the basic agreement was the one dated June 1, 1931.

The Baltimore contract was held illegal by unanimous decision of the Fourth Circuit, Parker, Soper and Dobie, JJ. (R., Vol. 18, p. 1). The Safe Harbor contract was held illegal in a subsequent related case by the District Court for Maryland, Bryan, J. (R., Vol. 18, p. 40). Those Courts held the two contracts illegal and void *ab initio* in their entirety under the Federal antitrust laws, Pennsylvania statutes, common law and public policy. Those Courts also held that the FPC had no authority to validate such contracts and that the FPC orders did not have that effect. This Court denied certiorari from the decision of the Fourth Circuit.

The contract litigation in the Fourth Circuit, begun December 21, 1948,* shortly prior to the first FPC order (January 5, 1949) here involved, was formally brought to the attention of the FPC in a petition for rehearing thereof (January 28, 1949),** but the FPC held that even if the courts determined the contracts to be illegal, such illegality would be immaterial to its orders. The decision of the Fourth Circuit, with certiorari denied by this Court, and the decision of the District Court for Maryland, were both rendered while the review of the FPC orders was pending in the D. C. Circuit. They were brought to the attention of that Court by formal motions, but the D. C. majority denied the motions and affirmed the FPC orders despite the decisions in the Fourth Circuit.

As was pointed out both to the FPC and the D. C. Circuit, Penn Water's objectives in the cases in the Fourth Circuit were (1) to be free to compete with Consolidated, particularly as regards sales and purchases at wholesale, without the illegal restrictive controls by Consolidated and illegal pooling of revenues provided for in the contracts, and (2) to have its policies, contracts and expansion, and the exercise of initiative with respect to its rates, services, operating economies and new business, controlled by its

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* The litigation was precipitated by Consolidated refusing to permit Penn Water, by letter of November 23, 1948 given under the Baltimore contract, to build a new steam electric generating plant.

** Thus Penn Water called the contract litigation to the attention of the FPC at the earliest practicable moment and while the rate case was still pending before it.

own Board of Directors as required by the laws of its state of incorporation.*

The Fourth Circuit held that the antitrust laws apply to Penn Water in the absence of an *express* statutory provision for exemption, and that the application of the antitrust laws was reaffirmed by reenactment in 1935 of Section 10(h) (16 U. S. C. §803(h))** of the Federal Power Act, but the D. C. majority held that the antitrust laws and Section 10(h) were *impliedly* repealed by the simultaneous enactment in 1935 of Part II of the Federal Power Act.

The Fourth Circuit held that the interchange of electricity must be by some method which "will not offend either the [Federal] anti-trust laws or the utility laws of Pennsylvania," (R., Vol. 18, p. 28) but the D. C. majority held in effect that "antitrust criteria" (R., Vol. 18, p. 55) do not apply to orders of the FPC, and that the FPC could order continuance of contractual arrangements judicially declared illegal and could base the critical features of its orders thereon. The D. C. majority did not even refer to the adjudicated invalidity of the contracts under state law and public policy or to any authority in the FPC to grant exemption therefrom.

The D. C. dissenting opinion agreed with the Fourth Circuit on all these points including the requirement of compliance with state law.

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* Contrary to assertions which have been made in these cases by Penn Water's opponents, the record is clear, as the Fourth Circuit said in a passage quoted in the D. C. dissenting opinion (App. B., p. 9a), that Penn Water is not trying to stop electric service to Consolidated and thereby to withdraw from interstate commerce and thus escape from whatever regulatory system Congress has imposed on such interstate electric business. What Penn Water seeks is to require the FPC to make its decisions as to rates and jurisdictional matters on the basis of physical deliveries of power and not on the basis of illegal and therefore non-existent contracts.

** "Section 10. All licenses issued under this Part shall be on the following conditions: * * *

"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

The decision of the D. C. majority is in direct conflict, on important questions of Federal law, with the unanimous decision of the Fourth Circuit and other courts and, if it should stand, would mean that all Federal regulatory bodies, even in the absence of express Congressional authority such as is given to the Interstate Commerce Commission, could claim authority to exempt transactions from any Federal or State laws.

The D. C. Circuit also held, contrary to statements made by the Court of Appeals for the Second Circuit* and another panel of the D. C. Circuit,** that a licensee (such as Penn Water) subject to regulation under Part I of the Federal Power Act, is also subject to the different regulatory system of Part II of that Act. The asserted applicability of Part II was, in turn, essential to the D. C. Circuit's holding that the antitrust laws were repealed by implication.

The Contracts.

The invalidated Baltimore and Safe Harbor contracts provided until 1980 for payments by Consolidated for power, not on the basis of a unit rate for capacity and energy, but on a basis which would provide for the sellers' operating expenses including taxes and a specified return on investment, regardless of the amount of power delivered or services rendered, with a credit to Consolidated for revenues received from sales of power to others. This is nothing more than a *revenue* pooling arrangement,*** a type of provision which has always been deemed illegal under the antitrust laws and public policy because it removes incentive to compete, obtain new business or effect operating economies. This type of arrangement similarly violates applicable Pennsylvania statutes. The contracts contained closely associated provisions providing for control by Consolidated over the contracts, sales, purchases, prices, output

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* *Niagara Falls Power Co.* v. *FPC*, 137 F. 2d 787, 792, 793 (1943).

** *Alabama Power Co.* v. *FPC*, 128 F. 2d 280, 293 (1942).

*** Petitioners are not here referring to pooling of power resources which results from interconnection.

and expansion of both Penn Water and Safe Harbor. The contracts were made at a time when Consolidated and Penn Water were under the common control of banking interests headed by J. E. Aldred (R., Vol. 18, p. 8).*

The contracts surrendered control of Penn Water and Safe Harbor to Consolidated, stifled their initiative with respect to rates, services, operating economies and new business and destroyed the independent corporate character of these Pennsylvania corporations, making Penn Water a "virtual vassal of Consolidated" (App. B, p. 6a) and Safe Harbor an "impotent agency" (R., Vol. 18, p. 41). For example, the provisions of the contracts had been used by Consolidated to interfere with Penn Water's and Safe Harbor's contracts with Pennsylvania customers** and, in 1948, to prohibit Penn Water from building a large new steam electric generating plant using coal deposited in the Susquehanna River (free but for the cost of dredging and processing) which would otherwise go to waste and from which plant power could have been economically produced this year, when power is greatly needed (R., Vol. 18, p. 914).***

The Corporations Involved and Their Businesses.

Penn Water and Safe Harbor are Pennsylvania electric utility corporations owning hydroelectric generating plants on the Susquehanna River. Penn Water also owns a steam electric generating plant and transmission lines in Pennsylvania and, through Transmission Company, transmission lines in Maryland. The present business of such companies is the sale and transmission of electric energy at wholesale and in bulk. Penn Water and Safe Harbor are licensees under Part I of the Federal Power Act.

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* There is at the present time no common control of Penn Water and Consolidated (R., Vol. 18, p. 8; App. B., p. 6a).

** PP&L, PE and ME. The contracts with these customers are all on the customary unit rate basis, i.e., payment based on amount of capacity or energy supplied and without managerial control by any purchaser over the seller.

*** The program, including attendant transmission lines and other facilities, involved about $20,000,000.

Consolidated is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around the City of Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor and is in the business of selling electric energy at wholesale and in bulk as well as at retail.

Power generated by Penn Water, Safe Harbor and Consolidated is in competition or potential competition everywhere in the region, as held by the Fourth Circuit and the District Court for Maryland (R., Vol. 18, pp. 5-6, 9 and 41).*

The FPC Orders Required Continuance of Contractual Arrangements Adjudged Illegal.

In its opinion denying rehearing (Feb. 28, 1949, R., Vol. 16, p. 372) the FPC stated that it was immaterial to its rate orders that the Baltimore and Safe Harbor contracts might be illegal and directed continuance of illegal arrangements of the Baltimore contract as follows:

> "In our opinion and order we took care to leave the continuation of the integrated and interconnected system in full effect, merely changing the rates, as shown by our statement wherein we specifically stipulated that
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> > "'The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company [Consolidated] takes what is left and assures Respondents [Penn Water and Transmission Company] of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. *That arrangement will, therefore, be continued* * * *'" (R., Vol. 16, pp. 378-9). (Italics and matter in brackets added.)

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* The location of the generating plants and transmission lines of these companies and other companies in the region is shown on a map attached hereto as Appendix A.

This requirement was also contained (as indicated in the quotation above) in the FPC's first opinion (Jan. 5, 1949), (R., Vol. 16, p. 175), and in finding 37 and par. (D) of its first order (R., Vol. 16, pp. 188, 189).

The first FPC opinion (No. 173) was incorporated in, and made a part of, its first order (Jan. 5, 1949), and the second order (Feb. 28, 1949) did the same with the second opinion (No. 173A) (R., Vol. 16, pp. 177, 386).

In paragraph (11) of its first order the FPC said:

> "The contracts referred to in (6) and (7) above [the Baltimore and Safe Harbor contracts], facilitate the achievement of those objectives *particularly by the methods of payment which they provide,* and by reason of the fact that generation of energy is directed by the coordinated action of load dispatchers in the City of Baltimore, representing the three system companies." (R., Vol. 16, p. 181). (Italics supplied).

It is thus clear that the FPC specifically ordered the continuance of the illegal revenue pooling provisions of the Baltimore contract.

While the Fourth Circuit did not specifically refer to these provisions in declaring the contract illegal, it did declare the entire contract invalid, and these provisions *are* illegal as shown in Point I (c) below. Furthermore, in directing their continuance the FPC apparently contemplated that the closely associated illegal restrictive provisions* which *were* specifically alluded to by the Fourth Circuit would be continued since (a) the FPC opinions and

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* The Fourth Circuit, in its second opinion, 186 F. 2d 934, 936 (R., Vol. 18, p. 37), holding that the invalidation of the 1931 Baltimore agreement did not reinstate the prior 1927 agreement, stated that the restrictions of the Baltimore contract were "closely associated" with the revenue pooling provisions, pointing out that it was conceded that without the restrictions the 1931 agreement would have been impracticable and would not have been made. The District Court for Maryland, holding that the restrictions of the Safe Harbor contract were inseparable from the remainder of that contract, stated, 97 F. Supp. 952, 955 (R., Vol. 18, p. 45), that they were the "warp and weft" of the contract. Both the Baltimore and Safe Harbor contracts were invalidated in their entirety.

orders are clearly based on that assumption (R., Vol. 16, pp. 45, 53-56, 179-180, 376-382), and (b) *the FPC stated in its brief (filed October, 1951 in the Fourth Circuit, attempting to intervene on appeal from the Maryland District Court's decision invalidating the companion Safe Harbor contract) that "the Commission's order prescribed the June 1, 1931, contract, as supplemented [the Safe Harbor contract], including the terms which the District Court viewed as in restraint of trade."* In the Penn Water rate orders and opinions the FPC praised and commended *all* of the restrictive provisions of the Penn Water contract.

For example, in its opinion denying rehearing, the FPC said:

> "By the terms of those contracts the installation of additional facilities by Penn Water is subject to approval by Baltimore Company[2] [fn. 2 quotes in full Article V of the Baltimore contract, the provision for restraint on plant expansion expressly held illegal by the Fourth Circuit], to assure coordinated planning and investment to meet the growing power needs of the system as a whole with resulting additional economies and consumer benefits." (R., Vol. 16, p. 378).

In that opinion the FPC further said:

> "In this case refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company would not be merely a termination of the purchase and sale of that energy (i. e., a cancellation subject to Section 35.5 of the Rules) but would constitute a change in rates and service in several aspects which cannot be accomplished except in compliance with requirements prescribed under Section 205 of the Federal Power Act." (R., Vol. 16, p. 380).

Here the FPC is referring to the power of Consolidated under Article IV of the Baltimore contract (R., Vol. 15, p. 4612), which the Fourth Circuit specifically held to be in violation of Section 3 of the Clayton Act (R., Vol. 18, p. 10), to require Penn Water to purchase needed supple-

mental energy from Consolidated by prohibiting Penn Water from purchasing such energy from others.

Again, in its order of October 27, 1949, the FPC (rejecting rate schedules filed by Penn Water pursuant to the first FPC order) prescribed allegedly proper rate schedules which called for the residual specified return formula contained in the Baltimore contract. In addition the FPC stated:

> "The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by Penn Water and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force." (R., Vol. 17, p. 62.)

FPC counsel has claimed that the phrase "in and of themselves lawful" in this paragraph is a qualification limiting the continued provisions to such as are legal, but these rate schedules were prescribed by the FPC (October, 1949) before even the trial court decision was rendered (February, 1950) and months before the Fourth Circuit decision declaring the Baltimore contract illegal (September, 1950). The phrase could not therefore have had any relation to the Fourth Circuit decision. Others have argued that the phrase is an affirmance of the FPC's opinion that all of the provisions of the contract are lawful. It is to be noted that the FPC, in its opinion denying rehearing referred to above, commended the restrictive provisions and also stated (R., Vol. 16, p. 378) "If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions." Furthermore the FPC expressly stated in its brief in the court below that the rate schedule which it

prescribed for Penn Water "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities" (Tr., p. 5574).*

In any event, since the D. C. majority has upheld the FPC orders on the ground that "antitrust criteria" are not applicable,** the FPC may use the decision to claim that it has, even in the absence of express statutory provision, the authority to ignore the antitrust and other laws.

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* The ambiguity of the requirement that the provisions of the Baltimore contract "in and of themselves lawful" should be observed is further indicated by the fact that the restrictive provisions of the contracts are not isolated ones but are reaffirmed and reflected throughout the contracts. Thus, in addition to the specific provisions requiring Consolidated's approval of substantial plant additions and contracts of Penn Water and Safe Harbor (R., Vol. 15, pp. 4557-9, 4612-3), there were additional provisions (R., Vol. 15, pp. 4567, 4613-4) preventing any action with respect to operating, engineering and accounting matters without the concurrence of a representative of Consolidated; and the payment provisions themselves (R., Vol. 15, pp. 4560, 4608-12) as already indicated, removed any incentive to take action without the concurrence of Consolidated.

** The D. C. majority attempted to distinguish the decision of the Fourth Circuit as to the illegality of the Baltimore contract by stating that the Fourth Circuit held illegal only certain restraints imposed upon Penn Water by Consolidated under the Baltimore contract. But it nowhere states that the FPC orders do not require continuance of the contractual arrangements under which these restraints were imposed. In fact it refers to the scope of the FPC's action as governing "the operations and arrangements under scrutiny" and states (making no exception as to the restrictive provisions) that Penn Water can only change its operations, contracts, arrangements, etc., in accordance with the Federal Power Act and with the consent of the FPC (R., Vol. 18, pp. 54-55).

The FPC Based Critical Features* of its Orders Upon the Assumed Existence and Continuance of the Illegal Contracts.

A. The prescribed rate of return was based on the assumption that Penn Water would receive the "stabilized income" provided by the Baltimore contract until 1980.

The FPC, prospectively, (i.e., from and after February 1, 1949, the specified operative date of the FPC orders), reduced the amounts payable by Penn Water's utility customers, for the purpose of limiting Penn Water's rate of return to only 5¼% per annum, on the express basis that "The contract with Baltimore Company [Consolidated] assures Respondents [Penn Water and Transmission Company] of a stabilized income" (R., Vol. 16, p. 147). The Baltimore contract gave Penn Water a "stabilized income" until 1980, irrespective of the periods of low flow in the Susquehanna River when Penn Water might not be able to generate and sell a normal amount of electricity. Without such long term continuing contractual obligation there was obviously no basis for the low return allowed. The D. C. majority states (R., Vol. 18, p. 66) that the FPC had "substantial evidence before it to support its findings" with respect to rate of return, but the central aspect of the "evidence" referred to by the D. C. Circuit (R., Vol. 18, p. 65) was that Penn Water is "insulated" from any "substantial risk" by the illegal Baltimore contract. Since the Baltimore contract has been adjudicated illegal there is no obligation whatsoever of Consolidated to Penn Water to continue to take or pay for any power at all. For example, Consolidated could stop taking power and paying a fixed rate at the end of a period of high flow when a large amount of power had been generated and delivered, leaving Penn Water to sell the relatively small amount of power coming from the river in low flow as best it could, thus receiving

* The dissenting opinion points out (App. B, p. 3a) that each of the critical features of the FPC's orders (discussed in paragraphs A, B and C below), namely (a) the rate of return, (b) the jurisdictional findings and (c) the allocation of cost of service is based respectively upon the financial security, operations, entitlements and obligations provided for by the Baltimore contract and the assumed continuance thereof until 1980.

much less than the allowed return. The fact is that the FPC order, in fixing the abnormally low rate of return, was clearly not based on operations as FPC counsel like to assert, but on the assumed contractual obligations of Consolidated to pay Penn Water a specified return until 1980. From operations there could be no "stabilized income".

B. The FPC held it had jurisdiction over intrastate services on the assumption that the illegal and non-existent contracts would continue.

The FPC also held that, because the companies were tied together under the illegal Baltimore and Safe Harbor contracts (R., Vol. 16, pp. 53-54) the services of Penn Water to the three Pennsylvania electric utilities, although rendered by Penn Water entirely within Pennsylvania, were interstate in character and subject to regulation by it*. Here again the D. C. majority attempted to minimize the effect of the contracts upon the decision of the FPC. But the decision of the D. C. majority is based upon its own assertion (R., Vol. 18, p. 63) that "Each sale [of Penn Water in Pennsylvania] is in effect a pool sale drawn from the integrated interstate system and hence interstate in nature." The existence of this so-called interstate pool depends upon the illegal contracts tying the companies together under the control of Consolidated and upon the illegal revenue pooling provisions thereof. The other basis of jurisdiction over Penn Water's sales in Pennsylvania asserted by the FPC (R., Vol. 16, pp. 54-55) was the purchase by Penn Water of some energy generated by Consolidated in Maryland to fulfill Penn Water's Pennsylvania contracts. Such purchases from Consolidated were compelled by a provision of the Baltimore contract (Art. IV, R., Vol. 15, p. 4612) which was held by the Fourth Circuit to be illegal under Section 3 of the Clayton Act (R., Vol. 18, p. 10). Without such contract Penn Water would not have been under such compulsion to purchase such supplemental energy outside of Pennsylvania. Obviously, this

* Lack of FPC jurisdiction over this Pennsylvania business would not mean that it would be unregulated but merely that regulation thereof would be by the Pennsylvania Public Utility Commission.

phase of the FPC orders rests on assumed continued existence of these contractual provisions, held illegal by the Fourth Circuit.

C. The allocation of the rate reduction between customers was based upon the alleged "entitlements" of Consolidated provided for under the illegal and non-existent contracts.

The FPC allocated the reduction between Consolidated and the three Pennsylvania electric utility customers of Penn Water, giving 89% of the reduction to Consolidated (R., Vol. 16, pp. 174-175), such allocation being determined on the basis of alleged "entitlements" (R., Vol. 16, pp. 172-3) of Consolidated under the Baltimore and Safe Harbor contracts and not on the basis of the power actually delivered. Without the illegal contracts such "entitlements" would be non-existent. As the dissenting opinion points out (App. B, pp. 2a-3a) " * * as a result of that interpretation [of the Baltimore contract] the Commission concluded that very substantial sales by Penn Water to others had really been for the account of Consolidated, and allocated the reduction accordingly". An allocation on a delivered power basis (that is, on actual operations) would have given the Pennsylvania utilities a much greater share of the rate reduction. The D. C. majority (R., Vol. 18, p. 69) plainly recognized that its affirmance of the allocation of the reduction provided for by the rate orders depended upon its decision that the FPC may exempt the Baltimore and Safe Harbor contracts from the antitrust laws and accordingly base its allocation upon the artificial entitlements created thereby rather than upon the actual deliveries of power.

Ultimate Relief Sought by Petitioners.

Petitioners request this Court to review this case and set aside the orders of the FPC, or in the alternative remand the case to the FPC with directions to it to limit itself (1) to a determination of the reasonable rates for power sold by Penn Water and Transmission Company to Consolidated from and after February 1, 1949 on the usual unit

rate basis and on the basis of the amount of capacity and energy actually supplied,* at a rate commensurate with the absence of any "stabilized income", and with allocations of any reduction in rates based on cost of service actually rendered and not on fictitious "entitlements," and (2) to a determination of whether, upon elimination of the illegal contracts from consideration, there is any basis for the exercise by the FPC of jurisdiction over Penn Water's services in Pennsylvania to the three Pennsylvania electric utility customers. By orders of the FPC and the D. C. Circuit, the rate orders have been stayed, and revenues in excess of the amounts prescribed in the rate orders are segregated and in suspense for the period from and after February 1, 1949, the specified operative date of the first FPC order if it becomes effective. Thus, the Courts and the FPC remain in a position to adjust rates properly for the entire period involved.** This should have been done by the FPC

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* Penn Water and the Transmission Company filed new rate schedules for service to Consolidated on that basis on February 6, 1951 immediately after the District Court (Coleman, J.) injunction requiring Penn Water to perform the Baltimore and Safe Harbor contracts had been vacated pursuant to mandate of the Fourth Circuit, but such rate schedules were rejected February 15, 1951 (Tr., pp. 5628-30) on the ground, among others, that to file new schedules, Penn Water "must recognize" the existing FPC orders, thus possibly barring itself from continuing to appeal from these orders in the Courts.

** Accordingly, there is no basis for the statement of the D. C. majority (R., Vol. 18, pp. 55-56) that "granting petitioners' motions would be to disrupt a pattern of regulation". Any delay of the FPC in rendering its decision in 1949 in a proceeding begun in 1944, with hearings concluded in 1947, was certainly not due to petitioners. The D. C. majority suggests (R., Vol. 18, p. 55) that Penn Water submit new arrangements to the FPC and appeal from any decision of the FPC thereon by which it feels itself aggrieved. This obviously is no answer to petitioners' contentions that in *these proceedings* the FPC has improperly directed continuance of, and based its orders upon, illegal contractual arrangements. Furthermore, a decision in any new proceeding could not remedy the excessive reduction and improper allocation thereof which the FPC has ordered for the period from and after February 1, 1949 and which would in the absence of modification on appeal be effective until the effective date of new orders in a new proceeding. Similarly, unless Penn Water is given relief in these proceedings, it would be required to continue illegal arrangements (held by the Fourth Circuit to be a violation of criminal law) which have been ordered continued by the FPC, until final determination (probably after several appeals) of such new proceeding.

on the petition for rehearing, or after the decision of the Fourth Circuit. As the dissenting opinion points out (App. B, p. 1a), "the Commission's orders stood in a vacuum after the Fourth Circuit held the contract invalid; the only service to which they can have application may not be lawfully continued".

The Baltimore and Safe Harbor contracts were properly stricken down by the Courts. They should not in any respect be maintained through the guise of FPC rate orders. Four Court of Appeals Judges have so decided (the three Judges of the Fourth Circuit and the dissenting Judge of the D. C. Circuit), whereas only two Court of Appeals Judges, the D. C. majority, have decided to the contrary.

Questions Presented.

I. Has the FPC authority, as the D. C. Circuit held contrary to the Fourth Circuit, (a) to require and approve contractual arrangements between electric utility companies specifically adjudged by the Fourth Circuit and District Court for Maryland to violate the Federal antitrust laws, and (b) to premise the critical provisions of its rate orders (which would otherwise have no basis) upon the existence and continuance of such illegal contractual arrangements?

II. Has the FPC authority, as the D. C. Circuit held contrary to the Fourth Circuit, (a) to compel a state utility corporation to maintain contractual arrangements which provide for surrender to another corporation of managerial functions and initiative, thus destroying its independent corporate character, and specifically adjudged by the Fourth Circuit and District Court for Maryland to be in violation of the statutes of the state of its incorporation and the common law and public policy, and (b) to premise the critical provisions of rate orders (which would otherwise have no basis) upon the existence and continuance of such illegal contractual arrangements?

III. Does Part II of the Federal Power Act repeal by implication regulatory provisions of Part I of the Act; and is a corporation which is subject to regulation under Part I

of the Federal Power Act as a licensee under contract with the Federal Government also subject to the different regulatory scheme of Part II of the Act, as the D. C. Circuit held contrary to statements of the Court of Appeals for the Second Circuit and another panel of the D. C. Circuit?

All the above described holdings are specified as errors to be urged.

REASONS FOR GRANTING THE WRIT AND ARGUMENT.

As to Question I: The decision of the D. C. Circuit holding that the FPC may, under the guise of a rate order, direct continuance of, and base its orders on, contractual arrangements held illegal under the Federal antitrust laws is in direct conflict with the decision of the Fourth Circuit and is erroneous.

The Fourth Circuit held specifically that the Baltimore contract is invalid under the Federal antitrust laws and that any new arrangement between the parties must be such as would not violate the antitrust laws, saying (R., Vol. 18, p. 28):

> "It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the [Federal] anti-trust laws or the utility laws of Pennsylvania."

And again (R., Vol. 18, p. 20):

> "The maintenance of uniformity of regulation and the control of the activities of an industry of national scope by a specialized body are as important in the field of electric power as in the field of transportation by rail or water; but the control of the Federal Power Commission over the power sites of the country and over the interstate transmission of electric energy is not disturbed by the retention of the jurisdiction of the courts to enforce the anti-trust acts."

The D. C. majority, on the other hand, affirmed the FPC's rate orders, stating (R., Vol. 18, p. 55) that it would be "at cross-purposes with the intent of Congress" for that Court "to substitute antitrust criteria for those of the Federal Power Act" and that therefore (R., Vol. 18, p. 69) "there is no need to consider whether the various contracts involved herein are part of an arrangement declared illegal under the antitrust laws."

(a) There Is No Exemption from the Antitrust Laws Unless Expressly Provided for by Congress.

The Fourth Circuit stated (R., Vol. 18, p. 13) "In short, the grant of monopolistic privileges, subject to regulation by governmental body, does not carry an exemption, unless one be *expressly* granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them." (Italics supplied.)

The D. C. majority, on the other hand, held (R., Vol. 18, p. 52) that "the antitrust laws are superseded by more specific regulatory statutes to the extent of the repugnancy between them,"* and found such repugnancy merely in certain general regulatory provisions of Part II of the Federal Power Act, none of which provide for exemption from the antitrust laws.

The D. C. majority decision is also in conflict with controlling decisions of this Court which were relied upon by the Fourth Circuit in holding the antitrust laws applicable to regulated industries (R., Vol. 18, pp. 12-13). *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945); *U. S.* v. *Ter-*

* The cases cited by the D. C. majority for this proposition do not support it. *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932), and *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939), both involved regulatory statutes containing provisions for express exemptions from the antitrust laws. *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500 (1936), and *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), hold that regulated industries are subject to the antitrust laws even though their rates and services are subject to the exclusive jurisdiction of regulatory bodies. *U. S. Alkali Ass'n.* v. *U. S.*, 325 U. S. 196 (1945), held that the Webb-Pomerene Act giving the F. T. C. the power to investigate violations of the Sherman Act did not give the F. T. C. power to enforce the Sherman Act or in any way repeal the enforcement provisions of the Sherman Act.

minal R. Ass'n, 224 U. S. 383 (1912); *U. S.* v. *Reading Co.*, 253 U. S. 26 (1920); *U. S.* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).*

The Federal Power Act does not contain, as do some Federal regulatory acts,** any provisions for obtaining exemptions from the antitrust laws, nor does the D. C. majority refer to any provision of that or any other act permitting the FPC to grant such exemptions or even to deal with antitrust law questions.*** In fact, the Federal Power Act makes it a condition of licenses granted thereunder that licensees are prohibited from entering into agreements "to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service" (Section 10(h)).

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* See also *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214 (1922) and *U. S.* v. *Union Pacific R. Co.*, 226 U. S. 61 (1912).

** Interstate Commerce Act, 49 U. S. C. §§5(11) and 5b(9); Communications Act, 47 U. S. C. §§221(a) and 222(c)(1); Civil Aeronautics Act, 49 U. S. C. §§492 and 494. The ICC, FCC and CAB are also, unlike the FPC, given express authority under Section 11 of the Clayton Act (15 U. S. C. §21) to enforce compliance with Sections 2, 3, 7 and 8 thereof (15 U. S. C. §§13, 14, 18 and 19). Under the Federal Power Act (§26 (16 U. S. C. §820)) it is the Attorney General of the United States rather than the FPC who enforces the antitrust laws.

*** The only provision granting any exemption upon approval of the FPC is found in a recent amendment (December 29, 1950) of Section 7 of the Clayton Act (15 U. S. C. §18) exempting acquisitions of stock or assets approved by the FPC and other specified commissions. This amendment clearly shows that specific enactment of Congress is necessary to give any exemption from the antitrust laws. The amendment (after the Fourth Circuit decision and the denial of certiorari) also clearly shows the correctness of the Fourth Circuit holding that the antitrust laws were not superseded by Part II of the Federal Power Act. Moreover, the fact that in such amendment Congress did not provide that FPC approval should exempt any other arrangements from any of the antitrust laws clearly shows that no other exemption is intended. In addition, the fact that Congress did not intend by the Federal Power Act of 1935 to give the FPC any power to grant exemptions from the antitrust laws is also evident from the fact that a provision in the 1935 bill (S. 2796, Sec. 203 (a)), as passed by the House, that dispositions of facilities, consolidations, acquisitions or control, approved by the FPC, should be exempted from any other Federal Acts making them unlawful, was dropped in conference.

The D.C. majority likened the Federal Power Act to the Interstate Commerce Act (R., Vol. 18, p. 53).* But, so far as the application of the antitrust laws to the fields covered by those Acts is concerned, there is no similarity. The Interstate Commerce Act contains *express provisions* (49 U. S. C. §§5(11) and 5b(9)), authorizing the Interstate Commerce Commission to approve, and thereby exempt, certain specified transactions, including revenue pooling arrangements (49 U. S. C. §5(1)), from the antitrust laws.**

Even express provisions for exemption from the antitrust laws of transactions approved by a regulatory body have been strictly construed, and the Courts have enforced the antitrust laws in respect of transactions other than those expressly authorized to be exempted, in the fields covered by the regulatory statutes involved. *Georgia* v. *Pennsylvania R. Co.*,*** *supra; U. S.* v. *Borden Co.*, 308 U. S. 188 (1939); *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226-227 (1940); and *Norfolk Southern Bus Corp.* v. *Virginia Dare Transp. Co.*, 159 F. 2d 306 (4th Cir. 1947) cert. den. 331 U. S. 827.

This Court has frequently held that there is no implied repeal of, or exemption from, the antitrust laws. *Georgia* v. *Pennsylvania R. Co., supra,* 324 U. S. at pages 456-457; *U. S.* v. *Borden Co., supra,* 308 U. S. at pages 198 and 201; *U. S. Alkali Ass'n.* v. *U. S., supra,* 325 U. S. at

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* *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19, 22 (8th Cir. 1950), cited by the D. C. majority, did not involve any question under the antitrust laws or the power of either Commission to grant any exemption therefrom. It only was concerned with the similarity of the *rate regulation* jurisdiction of the ICC and the FPC.

** Prior to enactment of such express provisions, this Court held transactions of the kind subsequently exempted thereby to be illegal; *U. S.* v. *So. Pacific Co.*, 259 U. S. 214 (1922), *U. S.* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920), *Georgia* v. *Pennsylvania R. Co., supra.*

*** Following this decision Congress enacted the Reed-Bulwinkle Act of 1948 (49 U. S. C. §5b (9)) specifically exempting certain railroad price fixing agreements when approved by the Interstate Commerce Commission.

page 209; *U. S.* v. *South-Eastern Underwriters Ass'n.*, *supra*, 322 U. S. at page 561.

The Attorney General, in an opinion to the Secretary of State dated October 31, 1944 (Vol. 40, p. 335, Op. No. 85), advised that a regulatory commission has no authority to exempt agreements from the antitrust laws except to the extent Congress has specifically so provided, and that statutory provisions granting such authority must be strictly complied with in order to be effective.

Both the Interstate Commerce Commission and the Federal Communications Commission recognize that they have no power to grant any exemption from the antitrust laws in the absence of express Congressional enactment.*

Sections 202** and 205 of Part II of the Federal Power Act (16 U. S. C. §§824a and 824d) from which the D. C. majority concludes that the FPC has authority to exempt the contractual arrangements between Penn Water, Safe Harbor and Consolidated from the Federal antitrust laws do not support such a conclusion. These are ordinary regulatory provisions which contain no provision for exemptions from the antitrust laws, and clearly do not destroy the specific mandate contained in Section 10(h) and the antitrust laws, which the FPC is given no power to waive.*** Furthermore, that Congress by enactment of such general regulatory provisions did not intend to authorize granting exemption from the antitrust laws is evident from the fact that it has, in some regulatory statutes, specifically authorized the granting of such exemptions in certain selected instances and with attendant specific limitations, conditions and safeguards.

There is clearly no "repugnancy" between the Federal antitrust laws and the sections of the Federal Power Act cited by the D. C. majority. On the contrary, as the Fourth

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* *Columbia Terminals Co.—Issuance of Notes*, 40 M. C. C. 288, 293 (1945); *Report on Chain Broadcasting*, Federal Communications Commission, May 2, 1941 (pp. 46-7).

** The rate orders under review were not issued under this section which was not in any way involved in the proceedings.

*** The dissenting opinion is in accord (App. B., p. 15a).

Circuit stated, the FPC is required to effectuate the policies of the Federal Power Act in a manner consistent with other laws including the Federal antitrust laws. In *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1942) (reversing an order of the Board directing reinstatement of employees who had been discharged because of a strike held to be in violation of the Federal laws regarding mutiny*), this Court said (p. 47):

> "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

Clearly, if there is no power even to condone violations of other laws, as in that case, there is no authority to grant exemptions, or require violations, as the FPC has attempted to do here.**

This Court's decision in *Parker* v. *Brown*, 317 U. S. 341, 350-352, cited by the D. C. majority (R., Vol. 18, p. 51) does not support the D. C. majority decision.*** That case merely held that the antitrust laws were not applicable to the State of California acting through its own agents. The FPC, however, is not a state but a Federal agency affected

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* Sections 292 and 293 of the Criminal Code (35 Stat. 1146 (1909), 18 U. S. C. §483-4 (1940)).

** Even where regulatory agencies have authority to give contractual arrangements exemption from the antitrust laws they should (as held in *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 80 (1944), and *Georgia* v. *Pennsylvania R. Co., supra*, 324 U. S. at page 456, both cases arising under a statute where provision for such exemption is made) give consideration and weight to the policies of the antitrust laws when doing so. This the FPC expressly refused to do, when by its order of February 28, 1949, it denied petitioners' petition for rehearing.

*** The *Sunshine*, *Rock Royal* and *Borden* cases cited by the D. C. majority (R., Vol. 18, p. 51) for the proposition that *Congress* may authorize arrangements which would otherwise violate the Federal antitrust laws are not in point. They all involved statutes which, unlike the Federal Power Act, contained express provisions for exemption from the Federal antitrust laws.

by all Federal laws, including the antitrust laws, as indicated in the *Southern Steamship* case, *supra*. In *Parker* v. *Brown*, this Court itself expressly stated (pp. 351 to 352) that the State could not give immunity to private parties to violate the antitrust laws. See also *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 389 (1951). In the present case the FPC is apparently seeking authority to permit private parties to continue illegal arrangements.

The case of *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 162 (1922), which the D. C. majority cites (R., Vol. 18, p. 54) for the proposition that a rate is not necessarily illegal because it is a *result* of a conspiracy in restraint of trade in violation of the antitrust laws is not in point. In that case the attack was solely on the amount, that is, the rate specified in an order of the Interstate Commerce Commission, and the Commission's order did not incorporate or embody the illegal conspiracy or arrangement alleged to exist. Here the FPC order under attack, while it purports to be only a rate order, does embody illegal arrangements, requires their continuance, and bases its critical features on the assumed existence and continuance thereof.*

(b) Section 10(h) of the Federal Power Act, Reaffirming the Antitrust Laws, Was Not Impliedly Repealed by Part II of such Act.

The D.C. majority, conceding (R., Vol. 18, p. 56) that "Section 10(h) does indeed virtually restate the Sherman Act", held that it, like the antitrust laws, is repealed *pro tanto* by implication by the provisions of Part II of the Federal Power Act discussed above stating:

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* Furthermore, in the *Keogh* case, the Court simply held that a rate already established by the Interstate Commerce Commission in one proceeding could not be attacked in a court in another proceeding. Here we have an appeal from the orders issued in the very proceeding in which the rates were prescribed, in which the appellate courts have statutory authority either to set aside the orders or to require that they be modified in the light of the established illegalities of the contractual situation. There is no attack here on a commission order which has gone into effect. The Courts are now determining whether the orders shall go into effect.

> "The very thing which that section [10(h)] prohibits, the combination of licensees with others to limit the output of electrical energy, is made one of the primary objectives of Part II."

The Fourth Circuit on the other hand held that the retention of Section 10(h) (which, along with other provisions of Part I of the Federal Power Act, was *reenacted* (49 Stat. 842, 844) in 1935 when Part II was added) indicates that the intention of Congress was to reaffirm the antitrust laws as applicable to electric utilities. The Fourth Circuit said (R., Vol. 18, p. 17):

> "The prohibition against monopolistic combinations was included among the conditions upon which the Power Commission may issue licenses for the construction and maintenance of power projects—not to deprive the courts of jurisdiction to enforce the anti-trust acts, but to make it perfectly clear that no licensee can legally agree to limit output, restrain trade or fix prices. The condition was a reaffirmance of the Sherman Act and was designed to restrict rather than to enlarge the Commission's authority."

The contrary statement of the D. C. majority is obviously incorrect since Section 202(a) (16 U. S. C. §824a (a)) expressly includes as the first purpose of Part II "the purpose of assuring an abundant supply of electric energy". The D. C. majority concedes (R., Vol. 18, p. 52) that "repeals by implication are not favored", but fails to point to any provision for express repeal.

(c) The Specified Return Formula Provided for in the Contracts Is Illegal Under the Antitrust Laws.

The FPC orders concededly did direct continuance of the provisions of the contracts containing the specified return formula. These provisions are in violation of the antitrust laws because they are in effect provisions for the pooling and division of earnings. Since they provide that Penn Water and Safe Harbor shall receive a specified return regardless of the services rendered, and credit Consolidated with revenue from other customers, they stifle the incentive

of Penn Water and Safe Harbor to compete, either with Consolidated or with others, and rob them of any initiative to obtain more customers and effect operating economies.*

In *U. S.* v. *Paramount*, 334 U. S. 131, 149 (1948), this Court held such arrangements for the pooling and division of earnings to be in violation of the antitrust laws stating "Clearer restraints of trade are difficult to imagine." Such arrangements were also held illegal in *U. S.* v. *Reading Co.*, 253 U. S. 26, 48 (1920); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 327-328 (1904); *Norfolk Southern Bus Corp.* v. *Va. Dare Transp. Co., supra*, 159 F. 2d at 309-10; *Lee Line Steamers, Inc.* v. *Memphis, Helena & Rosedale Packet Co.*, 277 Fed. 5, 8 (6th Cir. 1922); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.*, 61 Fed. 993, 997 (8th Cir. 1894).

The basic evil, so far as the Federal antitrust laws are concerned, in revenue pooling arrangements (as found in each of the foregoing cases) is the fact that they remove incentive to compete by providing that earnings shall be apportioned on some arbitrary basis unrelated to services rendered. It is therefore obvious that in the case of a two-party agreement such as the Baltimore contract, even though the incentive to compete is removed from only one of the parties, in this case Penn Water, and is not removed as to the other, Consolidated, the agreement is just as illegal as though the incentive of both were removed, because the elimination of competition on the part of one is sufficient to eliminate competition completely. Actually in the present instance, through the companion Baltimore and Safe Harbor contracts, the elimination of incentive to compete on the part of both Penn Water and Safe Harbor leaves Consolidated free of competition from either.

The FPC, in its brief attempting to intervene in the Fourth Circuit in October 1951 in the case relating to the

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* It should be pointed out here that in fixing the rates Penn Water was to receive there was no necessity of directing continuance of the illegal revenue pooling arrangements. The rates could have been fixed in a normal way on the usual unit rate basis customarily employed between utilities with payments based on the amount of capacity and energy actually supplied.

Safe Harbor contract, asserts (p. 14) that this payment plan prevents "setting up an economic interest upon his [the seller's] part," and argues (pp. 33, 34) that the restrictions on the seller are valid because, due to the payment plan, "its interests are not adversely affected" by the manner in which it is operated.

The fact that the rates and services of the parties to a revenue pooling arrangement are regulated does not excuse its invalidity under the antitrust laws any more than it excuses the invalidity thereunder of other restraints of trade. The decisions in the *Reading* and *Norfolk Southern Bus* cases related to utilities whose rates were regulated. Where Congress desired to permit (with adequate conditions, limitations and safeguards) the execution of revenue pooling arrangements by regulated companies it has specifically provided, in the applicable regulatory statutes, for their exemption from the antitrust laws.*

Regulation of rates (i.e., the amount to be charged) upon the basis of a return found reasonable, does not, as do the revenue pooling arrangements of the Baltimore and Safe Harbor contracts, insure the receipt of such return irrespective of whether or not the utility fails to render adequate service or loses business through a policy of non-competition.** The specified return provisions of the Baltimore and Safe Harbor contracts provide for payment even if no power at all is delivered.

The contention that a Federal regulatory agency may, pursuant to its authority to regulate rates, insure that a specified return will be received (or, in other words, regulate on the basis of a cost-plus subsidy plan) has been rejected by the Civil Aeronautics Board under the Civil

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* *Cf.* Section 5(1) and (11) of the Interstate Commerce Act (49 U. S. C. §5(1) and (11)); Section 15 of the Shipping Act (46 U. S. C. §814); and Sections 412(a) and 414 of the Civil Aeronautics Act (49 U. S. C. §§492(a) and 494).

** "A rate established as reasonable, whether by the company or the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business." *Georgia Ry.* v. *R. R. Comm.*, 278 Fed. 242, 247 (N. D. Ga. 1922), aff'd. 262 U. S. 625 (1923).